

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

THOMPSON V. ALEGENT HEALTH

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

HARLAND D. THOMPSON, APPELLANT,

V.

ALEGENT HEALTH IMMANUEL MEDICAL CENTER, A NEBRASKA NONPROFIT CORPORATION,  
AND ADMASSU Y. HAILU, M.D., APPELLEES.

Filed April 6, 2010. No. A-09-430.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Terry M. Anderson and Melany S. Lanagan, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellee Alegent Health Immanuel Medical Center.

David D. Ernst and Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Admassu Y. Hailu, M.D.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

**INTRODUCTION**

Harland D. Thompson appeals from the order of the district court for Douglas County, granting summary judgment in favor of Alegent Health Immanuel Medical Center (Alegent) and Dr. Admassu Y. Hailu. Following a medical procedure, Thompson brought suit for negligence against Alegent and Hailu (hereinafter collectively the Appellees), relying on the doctrine of res ipsa loquitur. The district court found the doctrine to be inapplicable to this case and granted summary judgment against Thompson. Thompson appeals. For the reasons set forth herein, we affirm.

## BACKGROUND

On March 24, 2006, Thompson entered Alegent to undergo a cardioversion procedure to his heart performed by Hailu. Cardioversion is a procedure where an electrical shock is delivered to the heart to convert an abnormal heart rhythm back to a normal rhythm. Before the procedure, Thompson did not have any problems with or pain in his left shoulder. After the procedure, Thompson complained of left shoulder pain and inflammation. Thompson was subsequently diagnosed with and treated for a torn left rotator cuff.

On February 16, 2007, Thompson filed a complaint in the district court against the Appellees. In the first count of the complaint, Thompson alleged that Hailu was negligent in failing to exercise the degree of skill and care possessed by other cardiologists in the community. In the second count of his complaint, Thompson alleged the vicarious liability of Alegent for the actions of Hailu and the hospital's nursing staff. Thompson stated that he intended to rely on the doctrine of *res ipsa loquitur* and alleged that Hailu and the nursing staff were negligent in failing to properly restrain him during the cardioversion procedure while he was under general anesthesia. Thompson alleged that the nurses assigned to assist Hailu in the care of Thompson while he was under anesthesia were negligent in that they failed to exercise the requisite degree of skill and care possessed by other cardiology nurses in the community. Thompson alleged that Hailu, the nurses, and other medical personnel employed by Alegent were negligent in that while he was sedated and under the exclusive control of Alegent, he suffered a torn left rotator cuff, which would not have occurred in the normal course of events absent negligence. Thompson alleged that as a direct and proximate result of the negligence of Hailu and of Alegent's agents or employees, he suffered painful, serious, and permanent physical injuries; was forced to incur medical, surgical, and hospital expenses; and would incur further medical expenses in the future.

Alegent answered, denying Thompson's allegations of negligence and affirmatively alleging that at all relevant times its agents and employees acted with the requisite degree of care, skill, and knowledge. In his answer, Hailu similarly denied Thompson's allegations of negligence and affirmatively alleged that Thompson's injuries were caused by something other than Hailu's negligent conduct and that Thompson's complaint failed to state a cause of action.

Both of the Appellees filed motions for summary judgment, which were heard by the district court on January 30, 2009. The district court received into evidence various affidavits, depositions, and exhibits offered by the parties.

Alegent offered the affidavit of Deanne M. Ernesti, its chief nursing executive. Based upon her review of the care provided to Thompson and her knowledge of the applicable standard of care, Ernesti stated that Alegent staff met the applicable standard of care in the treatment provided to Thompson.

Hailu offered his own affidavit in which he stated that he was a licensed physician, certified in the specialty of cardiology, and that he was the cardiologist who performed the cardioversion procedure on Thompson. Based upon his knowledge of the care provided to Thompson and the applicable standard of care, Hailu stated that he met the applicable standard of care in the treatment provided to Thompson. Hailu further opined that any injuries claimed by Thompson were not proximately caused by any negligence on his part.

The court also received selected portions of deposition testimony from Dr. Brett Fischer offered by Alegent. Fischer, an orthopedist practicing in Fremont, Nebraska, treated Thompson's left rotator cuff injury. Fischer did not have any specific information about what happened during the cardioversion procedure to cause an injury to Thompson's left shoulder; however, he had previously heard of a cardioversion procedure resulting in injury to a patient's shoulder. Fischer testified that the electrical impulse given during the procedure can cause contraction of the muscles, particularly in the upper body where the electrical shock is going through. According to Fischer, this contraction can cause subluxation or dislocation of shoulders and can occur even if the patient is properly positioned. As a resident, Fischer had the experience of treating a patient that had an injury to his shoulder from a cardioversion. When asked if the injury Thompson sustained to his left shoulder could happen "even with the best medical care," Fischer replied, "I think it's a possibility that it can occur during the course of a cardioversion."

In addition to his own deposition, Thompson offered the affidavit of Dr. Leonard Bodell, with an attached report. Alegent objected on the basis of hearsay to Bodell's unsigned report, while Hailu objected to the exhibit containing Bodell's affidavit and report on the basis of relevance and foundation. The district court indicated that it would receive the exhibit, but noted the Appellees' objections and stated that it would review them.

In his affidavit, Bodell stated that he was a licensed physician, certified in orthopedic surgery; that he had the opportunity to review several documents related to the case; and that he had reached certain opinions contained within the report attached to his affidavit. Bodell stated that all of the opinions contained in his report were to a reasonable degree of medical certainty. Although the attached report was not signed by Bodell, the affidavit contains Bodell's notarized signature. In his report, Bodell stated:

It is my opinion, to a degree of medical probability, based upon all the conditions which were stated in the initiation of this review that during the time that [Thompson] was under the care of the hospital and doctor performing the procedure, an event occurred during or immediately after the [cardioversion procedure] resulting in either a complete rotator cuff tear or extension and exacerbation of a previous asymptomatic rotator cuff tear. An acute rotator cuff tear or exacerbation of a pre-existent rotator cuff tear does not happen in the normal course of events with this type of procedure.

Bodell also opined that the event referenced above was the proximate cause of Thompson's symptoms following the cardioversion, leading to the surgical intervention performed by Fischer to repair Thompson's torn left rotator cuff.

The district court entered summary judgment in favor of the Appellees. The district court observed that in medical malpractice cases brought under the *res ipsa loquitur* doctrine, negligence may be inferred in three situations without affirmative proof and stated that Thompson "appears to assert that the circumstances of this case fit into the first or third category -- inference that negligence caused the injury." The court stated that if it were to accept into evidence Bodell's unsigned opinion that "an acute rotator cuff tear or exacerbation of a pre-existent tear does not happen in the normal course of events with this type of procedure," Bodell's opinion would not negate the testimony of Hailu and Ernesti that the proper standard of care was met. Accordingly, the court determined that Hailu's and Ernesti's testimony that the

proper standard of care was met should be treated as undisputed facts for the purposes of summary judgment. The court found that Fischer's testimony about the nature and effects of the electrical shock used in a cardioversion procedure prevented the case from proceeding under "an 'inference' of negligence exception." Accordingly, the court found that Thompson's attempt to proceed under the doctrine of res ipsa loquitur was inappropriate as a matter of law. Thompson subsequently perfected his appeal to this court.

#### ASSIGNMENTS OF ERROR

Thompson asserts, consolidated and restated, that the district court erred in granting the Appellees' motions for summary judgment and failing to apply the doctrine of res ipsa loquitur.

#### STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010). In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

#### ANALYSIS

Thompson asserts that the district court erred in granting the Appellees' motions for summary judgment and failing to apply the doctrine of res ipsa loquitur.

A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004). In a malpractice action involving professional negligence, the burden is on the plaintiff to show: (1) the generally recognized medical standard of care, (2) a deviation from that standard by the defendant, and (3) that the deviation was the proximate cause of the plaintiff's alleged injuries. *Id.* Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. *Id.*

When the doctrine of res ipsa loquitur is utilized, the examination of whether there is a genuine issue of material fact must be related solely to the issues under the required elements of the doctrine. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998). If the doctrine of res ipsa loquitur is applicable, the inference of negligence itself presents a question of material fact, and summary judgment is improper. *Id.* If, however, the doctrine of res ipsa

loquitur is inapplicable as a matter of law and there is no material question of fact regarding actionable negligence, summary judgment is proper. *Id.*

Res ipsa loquitur (literally meaning “the thing speaks for itself”) is a procedural tool that, if applicable, allows an inference of a defendant’s negligence to be submitted to the fact finder, where it may be accepted or rejected. *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996). Res ipsa loquitur allows an inference of a defendant’s negligence because the inference is probable and more plausible than any other explanation propounded. *Id.* In order that the doctrine of res ipsa loquitur may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and there is an absence of explanation by the alleged wrongdoer. *Id.*

In medical malpractice cases brought under the res ipsa loquitur doctrine, negligence may be inferred in three situations without affirmative proof: (1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, et cetera, in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries. *Keys v. Guthmann*, *supra*. Generally, the common knowledge exception to expert testimony is applicable in cases where a physician fails to remove a foreign object from a patient’s body or where a patient enters the hospital for treatment on one part of the body and sustains injury to another part of the body. *Id.* The common knowledge exception does not apply where the defendant physician’s negligence is not obvious from the facts and circumstances of the case. *Id.*

Despite the district court’s reference to the “first or third category” in which negligence may be inferred without affirmative proof in a medical malpractice case, it is clear that the second situation is the one potentially applicable in this case. This case clearly does not involve a situation in which a foreign object was left inside of Thompson and does not involve proof by experts in an esoteric field. In fact, Thompson addresses most of his arguments on appeal to the second situation, that being the “general experience and observation” situation.

This case is similar to *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996). In *Chism*, a patient suffered injury to her tooth after undergoing surgery to remove her gallbladder. The surgery required the insertion of an anesthesia tube and various pieces of equipment into the patient’s mouth. The patient sued the surgeon, anesthesiologist, and hospital for medical malpractice, relying solely on the doctrine of res ipsa loquitur to establish negligence. The defendants all sought summary judgment. At the hearing on their motions for summary judgment, the hospital and the anesthesiologist offered affidavits opining that the use of general anesthesia involves an “inherent risk” of damage to a patient’s teeth and that such damage occurs in a “fixed percentage” of patients, even when the appropriate standard of care has been met. *Chism*, 250 Neb. at 924, 553 N.W.2d at 744. Affidavits were also received into evidence stating that the requisite standard of care had been met. The patient submitted an affidavit from her dentist, opining that the patient’s tooth would not have been damaged during the surgery absent some “extraordinary circumstances” and stating his lack of awareness of a “fixed percentage” of patients receiving tooth damage while under general anesthesia. *Id.* at 925, 553

N.W.2d at 745. Similar affidavits were submitted at the hearing on the surgeon's motion for summary judgment. The trial court granted the defendants' motions for summary judgment, and the patient appealed.

On appeal, the patient in *Chism* argued that the trial court erred in not applying *res ipsa loquitur*, relying on the "general experience and observation" situation in which *res ipsa* can be applied. The Nebraska Supreme Court observed that the crucial question in any *res ipsa* case is whether the doctrine applies at all. The court considered the same general principles which we have outlined above in determining whether there was a genuine issue of material fact as to whether the patient's injuries would have occurred absent some negligence. The court noted the evidence presented at trial showing an inherent risk of tooth damage when general anesthesia is used even if the standard of care is met, as well as evidence showing that there was no way to determine whether a patient would bite down on the equipment used or to prevent such an occurrence, and the evidence showing that the relevant standard of care had been met during the patient's surgery. The court found that the patient's evidence did not refute the evidence presented by the defendants, stating in particular, that "[the dentist's] opinion that [the patient] should not have suffered damage to her tooth unless there were some 'extraordinary circumstances' in no way negates the statements in the [defendants'] affidavits that the proper standard of care was met or exceeded." *Chism*, 250 Neb. at 929, 553 N.W.2d at 747. Because the uncontroverted facts established that a fixed percentage of patients undergoing general anesthesia would suffer tooth damage even without negligence and that there was no way to prevent such damage from happening, the court held that the doctrine of *res ipsa loquitur* was inapplicable as a matter of law.

In the present case, there was evidence showing that Hailu and Alegent staff met the requisite standard of care. There was also evidence showing that the cardioversion procedure involves the use of an electrical shock which can cause upper body muscle contraction resulting in subluxation or dislocation of shoulders even when a patient is properly positioned. Thompson presented evidence through Bodell's affidavit and report that an acute rotator cuff tear or exacerbation of a preexisting rotator cuff tear does not happen in the normal course of events with this type of procedure. However, what is lacking from Bodell's statement is that the rotator cuff injury would not ordinarily occur "in the absence of negligence" as required for the application of the *res ipsa loquitur* doctrine. Like the dentist's statement in *Chism*, Bodell's statement does nothing to negate the evidence presented by the Appellees that the proper standard of care was met. Although the evidence in this case is not framed in terms of "fixed percentages" or "inherent risks," we conclude that the undisputed evidence in this case establishes that the use of an electrical impulse during the cardioversion procedure can cause muscle contraction and shoulder damage even in the absence of negligence. Accordingly, the district court did not err in finding that the doctrine of *res ipsa loquitur* was inapplicable as a matter of law.

Unlike the patient in *Chism*, in addition to relying on the doctrine of *res ipsa loquitur*, Thompson set forth allegations of general negligence against Hailu. However, as we have already stated, Thompson's evidence does not negate Hailu's statements that he met the applicable standard of care. Accordingly, we conclude that the district court did not err in granting the Appellees' motions for summary judgment.

## CONCLUSION

The district court did not err in granting the Appellees' motions for summary judgment.

AFFIRMED.